SHAHKRI HUSSAIN

v.

MENTERI HAL EHWAL DALAM NEGERI MALAYSIA & ANOR

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[CRIMINAL APPLICATION NO: 44-18-99]
17 JANUARY 2000

PREVENTIVE DETENTION: *Detention order - Detention order pursuant to s. 6(4) Drug Dependants (Treatment and Rehabilitation) Act 1983 - Whether defective as s. 6(4) deleted by amending act - Whether applicant released*

This action initially began as a *habeas corpus* application to have the applicant released on the premise that he had been detained lawfully. At the hearing, the applicant brought to the court's attention that the detention order meted out by the magistrate against the applicant pursuant to s. 6(4) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the principal act') was defective.

Held:

[1] The Drug Dependants (Treatment and Rehabilitation) (Amendment) Act 1998 which came into force on 1 September 1998 deleted s. 6(4) of the principal act. When the magistrate meted down the detention order on 7 July 1999, it was pursuant to the non-existing s. 6(4) of the principal act. Thus, the magistrate's order was pursuant to a section unknown to law.

[2] Pursuant to Chap. XXX1 of the Criminal Procedure Code, a revision was in order. The applicant's release without further ado was the only logical step to undertake. No constitutional right of an applicant should be compromised or made subservient to some administrative decision merely to maintain decorum and administrative efficacy. Any delay in his release, not only would be an unsound judicial act but an unnecessary curtailment of his rights and freedom.

[Order of magistrate set aside.]

Case(s) referred to:
PP v. Hussain Che Lak & Anor [1970] 1 MLJ 37 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 259, Chap XXXI
Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 4(1)(b), 6(4)
Federal Constitution, art. 5(1)

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar J:

The application began initially as a *habeas corpus* action, to have the applicant released before me, on the premise that he had been detained unlawfully. The complaint was that his fundamental liberty had been breached, a basic human right protected under art. 5(1) of the Federal Constitution. In support of the *habeas corpus* application, and to reflect the seriousness of his predicament, the applicant successfully obtained a certificate of urgency from the High Court. At the appointed open court day, the hearing date which had been converted previously to a mention date, the applicant's counsel one Dato Shukri was present but not that of the respondents'. The absence of the respondents' counsel, though not encouraged, regretfully was permitted by the court earlier founded on some good grounds. The saving grace of the respondents' position, in term of representation, was the presence of Encik Dusuki, the locally based deputy public prosecutor.

The learned deputy public prosecutor unfortunately had received no specific instruction except to mention the case on behalf of the relevant federal counsel. It transpired that the latter had successfully obtained the respondents' prior approval for the postponement, conditional on the matter not being postponed too long. To the credit of this officer, he did fax me a letter clarifying exhaustively his predicament, and spelling out in no uncertain terms the positive attitude of Dato Shukri. He explained, *inter alia*, that:

i. he was in the process of obtaining the notes of proceedings from the magistrate court;

ii. he was in the midst of preparing the affidavits-in-reply; and

iii. that he was involved with an appeal in the Court of Appeal.

On receipt of that communication, and on the above reasonable grounds, how could I not exercise my discretionary powers and permit the postponement application [s. 259 of the Criminal Procedure Code (FMS Cap 6)]. I indicated my agreement through Puan Wan Fadhilah, my senior assistant registrar. Come the hearing date, whilst in the midst of discussing the administrative problems

faced by courts of finding a future suitable date, certain pertinent legal issues connected to this case were brought to my attention by the applicant's alert counsel. The latter, after having perused the matter at hand, had discovered that the order meted out by the learned magistrate was obviously defective; agreed even by the learned deputy public prosecutor. After appreciating the information, which was to the detriment of the applicant, it thus became incumbent upon me to reconsider the whole situation, inspite of having granted the postponement. To postpone the case would have meant being partisan to the federal counsel's request, which would be at the expense of the applicant. To reconsider my earlier decision would also cast the aspersion that the court had backtracked on its words.

To appreciate my subsequent action, it is necessary for me to dissect that relevant order. The applicant had initially been detained under s. 4(1)(b) of the Akta Penagih Dadah (Rawatan Dan Pemulihan) 1983. After the necessary investigations had been undertaken and completed, he was brought before the relevant magistrate for the necessary detention order. Up to this stage everything appeared correct and done in accordance with the law. The flaw reared its ugly head after this stage. The magistrate perhaps ill-advisedly, had ordered the detention of the applicant for two years at the Pusat Serenti Besut, Terengganu pursuant to s. 6(4) of the Drug Dependants (Treatment and Rehabilitation) Act 1983, effective on 7 July 1999 *ie*, the very date when he pronounced the order. On further reading, it surfaced that pursuant to certain legislative changes, the above Act (Act 283) had been massively amended. The relevant amendment Act is the Drug Dependants (Treatment And Rehabilitation) (Amendment) Act 1998 (Act A1018), effective on 1 September 1998. Pursuant to this amendment s. 6(4) was deleted. Yet when the magistrate meted down the detention order on 7 July 1999, it was still pursuant to the non-existent s. 6(4). In brief, the order was pursuant to a section unknown to law (see *PP v. Hussain Che Lak & Anor* [1970] 1 MLJ 37).

After doing some soul searching, bearing in mind the circumstances of the case, namely, the order being obviously defective, coupled with the applicant's fundamental constitutional right having been breached, and there being a deputy public prosecutor in court to represent the respondents, I undertook to do the needful. Pursuant to Chapter XXX1 of the Criminal Procedure Code, I invoked my statutory powers and thenceforth exercised my revisionary powers. With there being no criteria as to the circumstances under which the High Court could exercise the power of revision, but without being arbitrary and desirable in the interest of justice, I was satisfied that in the circumstances of the case, a revision was in order. This was a case too clear for comfort to ignore, wherein his release without further ado, was the only logical step to undertake.

No constitutional right of an applicant should be compromised or be made subservient to some administrative decision merely to maintain decorum and administrative efficacy. I was also aware that even if I were to postpone the case, and hence entailing a further incarceration of the applicant, at the next hearing date I would still have had him released. Any delay in his release, not only would be an unsound judicial act but an unnecessary curtailment of his rights and freedom.

Based on the above grounds I had no hesitation in setting aside the order of the learned magistrate.